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IN THE

Supreme Court of the United States

No. 75-798

AMERICAN INSTITUTE OF MERCHANT SHIPPING,
LINER COUNCIL
Petitioner

vs.

AMERICAN MARITIME ASSOCIATION,
PETER G. PETERSON, *et al.*
Respondents

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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December 4, 1975

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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OPINIONS BELOW

The June 12, 1972, decision of the Maritime Subsidy Board [A-34-71] is unofficially reported at Pike & Fisher, 13 SRR 44. The February 7, 1974, opinion of the District Court [A-29-38] is unreported. The September 5, 1975, opinion of the Court of Appeals for the District of Columbia Circuit [A-1-28] is reported at 518 F.2d 1070. Each is reproduced in the Appendices to the primary petition in this case, that of American Maritime Association. Our references are to that Appendix [A-1-80].

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The decision and judgment of the court below were entered on September 5, 1975.

QUESTION PRESENTED

Whether the Maritime Administration is authorized to issue regulations which require the abatement of operating-differential subsidy, on a sliding scale, to the extent that more than 50 per cent of the annual freight revenue on either leg of a voyage is derived from certain categories of "preference cargo," reserved in whole or in part for carriage by U.S.-flag vessels.

STATUTES INVOLVED

There are directly involved (a) Sections 101, 601, 603 and 901(b) of the Merchant Marine Act, 1936, 49 Stat. 1985, 46 U.S.C. §§ 1101, 1171, 1173 and 1241, and (b) roughly a dozen statutes providing for Government grant or financing of goods destined for foreign relief or consumption.

STATEMENT

1. *The 1936 Act.* The Merchant Marine Act, 1936, 49 Stat. 1965, 46 U.S.C. §§ 1101 et seq., authorizes the award of subsidy in two areas: Title V authorizes payment of construction-differential subsidy to shipyards, and Title VI authorizes payment of operating-differential subsidy to ship operators, in each case in an amount designed to off-set the lower costs of foreign competitors.

2. *The Preference Cargoes.* The Act of April 28, 1904, 10 U.S.C. § 2631, requires that all military cargo be shipped on U.S.-flag vessels; Public Resolution 17 of March 26, 1934, 15 U.S.C. § 616a, requires that except

as waived by the Maritime Administration all cargo resulting from U.S. Government loans be shipped on U.S.-flag vessels. At least nine post-war relief statutes required that at least 50% of the cargo shipments be on U.S.-flag vessels.[1] The cargo preferences established individually by those statutes were consolidated and codified in 1954 as § 901(b) of the Merchant Marine Act.

The preference cargoes fall into three principal categories when classified according to their shipping characteristics:[2] (a) Military cargo, reserved entirely for U.S.-flag vessels, has since 1966 been allocated among the lines on the basis of semi-annual competitive bids [A-46-48]. (b) Civilian preference cargo, usually in packaged form and flowing out of the ordinary commercial world, moves under conference rates uniform for preference and commercial cargoes, and for U.S.- and foreign-flag carriers [A-48-51]. (c) Civilian preference cargo moving usually in bulk at "open rates" is individually bid by the carrier without conference control. Most of the carriage is by tramp vessels in full load lots but some moves in smaller parcels aboard liners. As only U.S.-flag vessels can bid for the 50% which is preference, the rates are typically more than the foreign-flag bids on the other 50% [A-51-52].

3. *The Agency Proceedings.* American Maritime Association ("AMA") on July 1, 1969, petitioned the Secretary of Commerce to issue rules which would require the

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[1] Economic Cooperation Act, 62 Stat. 143; Amendments to E.C.A., 63 Stat. 50; Mutual Defense Assistance Act of 1949, 63 Stat. 714; Yugoslav Emergency Relief Assistance Act of 1950, 64 Stat. 1122; India Emergency Food Aid Act of 1951, 65 Stat. 69; Wheat for Pakistan Act of 1953, 67 Stat. 80; Famine Relief Act of 1953; Agricultural Trade Development and Assistance Act of 1954, 68 Stat. 454; Mutual Security Act of 1954, 68 Stat. 832.

[2] We pass over a fourth and less prevalent category recognized by the agency: open-rated preference cargo which moves at world rates [A-52-53].

repayment of operating subsidy in exact proportion to the carriers' revenues from all types of preference cargo. The American Institute of Merchant Shipping, Liner Council ("AIMS") answered. The matter was in the end delegated to the Maritime Subsidy Board which directed an evidentiary fact-finding hearing [A-6-7].

Before the agency, and subsequently before the courts, AMA and AIMS have taken diametrically opposed positions. AMA urged that, as the Merchant Marine Act conditions subsidy upon a determination that the subsidized vessels will meet foreign competition, so no subsidy can be paid in respect of any cargo which is not subject to foreign-flag competition. AIMS urged that if the vessels and the services were competitive, there was no requirement that particular lots of cargo be subject to foreign-flag competition.

The Chief Examiner concluded AMA was right as to military and open-rated civilian preference cargo, but not as to conference-rated civilian preference cargo [A-7]. The Maritime Subsidy Board on exceptions held [A-42]:

> * * * the Board finds that it can accept neither the AIMS nor the AMA interpretation of § 601. The Board specifically rejects AMA's contention that subsidized vessel operations must be devoted almost exclusively to carriage of cargo subject to foreign-flag competition in order to qualify for an ODS contract. The Board also rejects AMA's contention that ODS may be paid under a valid contract only for carriage of cargo subject to foreign-flag competition. We think the statute and its legislative history clearly establish that the purpose of the ODS program is not to subsidize cargo carriage but instead to subsidize operation of vessels so that the vessels are in a position to carry cargo on a competitive basis. On the other hand, we do not accept the AIMS position that the actual performance of a vessel operator as a competitor can be ignored.

> Rather, it is our judgment that payment of subsidy for operation of vessels must be governed by the degree to which the competitiveness of that operation is reflected in actual operating experience.

This principle led the Board to conclude that subsidy should be reduced, on a sliding scale, to the extent that more than 50% of the annual freight revenue, on either the outward or the inward legs of the voyage, derived from military or open-rated civilian preference cargo. [A-43-36, 48, 52] Regulations to accomplish this were proposed [A-75-80] and subsequently adopted [46 C.F.R. § 380.1-10].

4. *The Court Proceedings.* AMA filed a complaint in the District Court to set aside the Board decision.[3] AIMS, because the practical injury to its members was not large, did not file suit, but instead intervened as a defendant along with the Government officials. It advanced, however, its full argument as a reason for dismissing the AMA complaint. District Judge Aubrey Robinson accepted the AIMS reasoning and dismissed the complaint [A-29-33].

Both AMA and the Government defendants appealed. The Court of Appeals accepted the Government reasoning and remanded to the Distrit Court for modification of its order of dismissal [A-1-28].

REASONS FOR GRANTING THE WRIT

1. We shall urge that the AMA petition, *American Maritime Association* v. *Peterson*, No. 75——, should be denied. If that petition be denied, so too should this cross-petition be denied.

2. If, contrary to our contentions, the AMA petition should be granted, then so also should this cross-petition

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[3] Jurisdiction, asserted under 28 U.S.C. §§ 1331, 1333, 1337 and 5 U.S.C. §§ 701-706, was not challenged.

be granted, in order that the Court may have the whole case before it. Indeed, as we read the opinion of the Court below, it devoted 17 pages to a discussion of the merits [A-11-28] of which 13 were directed primarily to a rejection of the AIMS argument [A-12-25].

3. The AIMS argument is in any view a substantial one, which should also be considered by this Court if it were to consider any part of the case. In synopsis, we urge:

(a) The statute in six passages in §§ 601-603 defines the necessity that subsidy be designed to meet foreign-flag competition. In every instance it speaks of "vessels" or "service, route or line," and never of particular cargoes.

(b) The principal cargo preference statutes—for military and Government-financed cargoes—antedated the 1936 Act. That Act itself established three types of U.S.-flag preference. §§ 212(d), 405, 901(a). Yet there is not a word in the statute or its history to suggest that the vessels subsidized by the 1936 Act could not carry these cargoes, or would be subject to subsidy abatement if they were carried.

(c) Throughout the 1948-1954 period of individually enacted preference provisions in connection with foreign relief legislation (*supra*, p. 3) the Congress explicitly recognized that the subsidized lines would share in the carriage of the preference cargo. As the House Merchant Marine & Fisheries Committee concluded after 1955 oversight hearings:[4]

> "* * * if a vessel sails with empty or half empty holds under circumstances where his foreign competitor would lose money, the American owner likewise loses notwithstanding the subsidy paid on his

[4] H. Rep. No. 1818, 84th Cong., 1st Sess., p. 2.

operating expenses. He must have cargo, in other words."

(d) The Maritime Subsidy Board may never have addressed this issue in the same depth as it did in this proceeding [A-17, 38], but it is not contested by the Government that (a) the Board from 1936 to the present day has never refused or reduced a subsidy voucher because of the carriage of preference cargo, and (b) in at least 21 formal proceedings, reaching from 1949 to 1974, has recognized that subsidized lines were carrying military or civilian preference cargo. For one of many examples, in *American President Lines, Ltd.*, 65 SRR 1031, 1041 (1966), the Board noted that "the needs of moving defense cargo are considered when determining how much vessel capacity is needed for the trade * * *."

(e) The Comptroller General in Op. B-159245, SRR 10,264 (1966) followed much the line of reasoning indicated above and concluded—

> "* * * this legislative background and the long-established administrative practice must be considered as establishing that operating-differential subsidy is payable, without reduction, even though a part of the cargo carried on particular voyage is military cargo which is reserved for U.S.-flag vessels."

(f) The difference between AIMS and the Government thus comes down to the narrow issue of whether the Maritime Administration can undo this long administrative practice, accompanied throughout by Congressional understanding and acquiesence. The Court below, recognizing that "the decisions are not uniform," thought "the better rule appears to be that an agency is free to act when conditions change and is not tied to past practices." [5]

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[5] A litigating dilemma inheres in the Court's use here of a "changed conditions" rationale. The agency record closed with 1969, at the height of the Vietnam war, and naturally showed a heavy concentration of trans-Pacific preference cargo. By the time

[A-22-23]. None of the cases establishing this "better rule" dealt with an agency interpretation of 23 years standing, buttressed by an explicit Congressional understanding evidenced over the first six years of the period and never thereafter altered. A rule so firmly established may be changed, or "modernized," only by the Congress.

CONCLUSION

If the primary petition in *American Maritime Association* v. *Peterson*, No. 75——, should be granted, so too should this petition be granted in order to have the whole case before the Court. If the primary petition is denied, so too should this petition be denied.

Respectfully submitted,

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of the 1975 decision of the Court of Appeals, the Vietnam war was long over, and the latest change in conditions—not reflected in this record—returned the conditions to where they were before Vietnam. Yet if the case were remanded to produce evidence of this change back to unchanged conditions, another several years would pass with who knows what subsequently developed change in conditions

CERTIFICATE OF SERVICE

I hereby certify that in compliance with Rule 33 of this Court service of three copies of the foregoing petition has this day been made by first class mail, postage prepaid, upon Joseph A. Klausner, Esq., 1028 Connecticut Avenue, N.W., Washington, D. C. 20036 and upon the Solicitor General, Department of Justice, Washington, D. C. 20530.

WARNER W. GARDNER